FOURTH DIVISION
DILLARD, P. J.,
RAY and SELF, JJ.

May 31, 2017

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A17A0037. REDEMPTION ALLIANCE OF GEORGIA, INC. et al. v. MICHAEL G. LAMBROS, IN HIS OFFICIAL CAPACITY AS SPECIAL ASSISTANT DISTRICT ATTORNEY FOR CLAYTON COUNTY.

SELF, Judge.

We granted this discretionary appeal to review the order awarding attorney fees to Special Assistant District Attorney Michael G. Lambros, in an action filed by Redemption Alliance of Georgia Inc., Gaming Central LLC, and William A. Booth ("appellants") seeking declaratory, injunctive, and mandamus relief. For the reasons discussed below, we vacate the trial court's order and remand the case with direction. The relevant facts follow.

On November 12, 2014, appellants filed an action against Samuel Olens, in his official capacity as the Attorney General of Georgia, and Lambros, in his official

capacity as Special Assistant District Attorney for several Georgia counties. Appellants alleged that Lambros was appointed Special Assistant District Attorney for the purpose of initiating civil RICO actions and pursuing forfeiture proceedings against organizations and persons, such as appellants, who place and operate coin operated amusement machines in convenience stores and are alleged to have unlawfully paid out cash winnings. Appellants further alleged that Lambros's compensation was contingent upon the success of the forfeiture actions, which created an impermissible conflict of interest, and that Lambros violated their constitutional rights and the forfeiture statutes due to the manner in which he carried out his responsibilities. Appellants sought a declaratory judgment that a conflict of interest was created by the contracts between Lambros and various counties, that the excessive seizures violated due process, and that OCGA § 16-4-1, et seq. was unconstitutional. They also sought a writ of mandamus to compel Lambros to afford due process rights to in personam defendants and a permanent injunction of Lambros's actions.

Lambros answered the complaint in his official capacity and filed a motion to dismiss on several grounds, including that the complaint fails to present a justiciable controversy and is barred by sovereign immunity. Subsequently, appellants filed a

second amended complaint, naming Lambros[1] in his individual capacity[2] and limiting their claims to declaratory and injunctive relief. Appellants also moved to dismiss Olens as a party and responded to Lambros's motion to dismiss, arguing that he was not protected by sovereign immunity because he had been sued in his individual capacity. Lambros answered the first[3] amended complaint in his official capacity, filed a reply brief in support of his motion to dismiss, and responded to appellants' motion to dismiss Olens. Appellants filed a voluntary dismissal without prejudice as to all defendants on March 20, 2015, four days before a scheduled hearing on the motions.

After appellants dismissed the action, Lambros moved for attorney fees pursuant to OCGA § 9-15-14, arguing that appellants' claims for mandamus, injunctive relief, and a declaratory judgment were barred by sovereign immunity at

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[1] Appellants previously filed a first amended complaint, correcting Lambros's name.

[2] Appellants did not file a motion seeking leave to add a party pursuant to OCGA §§ 9-11-15 and 9-11-21. "Because [appellants] never sought leave of court to add [Lambros] as a party in his individual capacity, any unilateral attempt by [appellants] to amend their complaint in this regard was ineffective." *Bd. of Commrs. of Glynn County v. Johnson*, 311 Ga. App. 867, 873 (2) (717 SE2d 272) (2011).

[3] It appears Lambros mislabeled this answer as it was filed in response to appellants' *second* amended complaint, not the first.

all times and that he was never sued or brought into court in his individual capacity in spite of the appellants' attempts to add him as a party in that capacity simply by changing the caption of the case. Appellants responded that Lambros's motion to dismiss was moot in light of the voluntary dismissal; that he could not seek fees because he represented himself, which would give him a personal stake in the outcome of the case; that whether declaratory relief was available to appellants is a justiciable issue of law; and that fees were not justified under subsection (a) or (b) of OCGA § 9-15-14.

Appellants also filed a motion to compel responses to discovery they served on Lambros after he moved for fees, which Lambros opposed. The trial court denied the motion to compel and scheduled a hearing on the motion for fees. In its order denying appellants' motion to compel, the trial court ruled that by dismissing their lawsuit, appellants could not obtain discovery under OCGA § 9-11-26 because there was no "pending action" under the meaning of that statute. However, the trial court noted that appellants were entitled to a full evidentiary hearing before the award of any attorney fees and scheduled a hearing for September 8, 2015.

During the hearing on Lambros's motion for attorney fees, Lambros explained that he tendered his defense to the Attorney General's Office and Prosecuting

Attorney's Council of Georgia, both of which declined to provide him a defense lawyer, then to each District Attorney who appointed him as a Special Assistant District Attorney, all of whom authorized him to provide for his own defense. Lambros then retained The Lambros Firm, LLC, a law firm of which he is the principal, to defend him in this case. Three attorneys, including Lambros, worked on his defense; the firm's invoice shows that the bulk of the work was performed by attorneys other than Lambros. On December 10, 2015, the trial court entered an order awarding $48,690 in fees and $370.97 expenses to Lambros, pursuant to OCGA § 9-15-14 (a) and (b). The order did not mention any of the factual allegations contained in the complaint, but concluded that the action was frivolous because a minimum amount of research would have revealed that sovereign immunity barred all claims against Lambros in his official capacity. This appeal followed.

> Pursuant to OCGA § 9-15-14 (a), the trial court shall award attorney fees when a party asserted a claim, defense or other position with "such a complete absence of any justiciable issue of law or fact" that the party could not reasonably have believed that the court would accept it. We affirm an award under subsection (a) if there is any evidence to support it. Pursuant to OCGA § 9-15-14 (b), the court may award attorney fees if a party brought or defended an action that "lacked substantial justification" or "was interposed for delay or harassment, or if the court finds that an attorney or party unnecessarily expanded the

> proceeding by other improper conduct." We review a subsection (b) fee award for abuse of discretion.

(Citations and punctuation omitted.) *Reynolds v. Clark*, 322 Ga. App. 788, 789-790 (1) (746 SE2d 266) (2013).

1. In their first enumeration of error, appellants contend that the trial court erred by awarding attorney fees to Lambros because he did not seek them on behalf of an actual "party litigant" but on behalf of himself as an attorney representing the State. Appellants cite to *Brewer v. Paulk*, 296 Ga. App. 26 (673 SE2d 545) (2009), for the proposition that "any award of fees or expenses under OCGA § 9-15-14 (a) shall be awarded to any party and not directly to the attorney for the party [as the award] is for the benefit of the party litigant." (Citation and punctuation omitted; emphasis omitted.) Id. at 31 (2). Appellants also argue that as a Special Assistant District Attorney, Lambros could not have a financial stake in the litigation. Lambros agrees that attorney fees may only be awarded to a party and not directly to the attorney for the party, but contends that his firm was never representing the State in the underlying case; rather, the firm represented Lambros, who had been sued in his official capacity.

The record shows that Lambros tendered his defense to the Attorney General's Office and Prosecuting Attorney's Council of Georgia, both of which declined to provide him a defense lawyer, then to each District Attorney who appointed him as a Special Assistant District Attorney, all of whom instructed him to provide for his own defense. Lambros then retained The Lambros Firm, LLC, a law firm of which he is the principal, to defend him in this case. Although this case presents an unusual factual situation, recovering attorney fees for work performed in one's defense is not tantamount to having a financial stake in the outcome of the case. Moreover, in light of our deference to the trial court and its explicit findings as to the reason for the involvement of Lambros's firm, we cannot conclude that the trial court erred in concluding that it could award fees to Lambros. See *Harkleroad v. Stringer*, 231 Ga. App. 464, 467-468 (1) (499 SE2d 379) (1998) (awarding attorney fees to pro se law firm under OCGA § 9-15-14).

2. In their second enumeration of error, appellants contend that attorney fees were not warranted under OCGA § 9-15-14 (a) or (b). Appellants maintain that their claim for a declaratory judgment[4] presented a justiciable issue of law and did not

[4] Appellants did not argue below that their claim for injunctive relief presented a justiciable issue and they make no such assertion on appeal. Likewise, they make no argument on appeal regarding the viability of their mandamus claim.

unnecessarily expand the proceedings, particularly in light of our Supreme Court's recent ruling in *Olvera v. Univ. System of Ga. Bd. of Regents*, 298 Ga. 425 (782 SE2d 436) (2016). We agree.

In *Olvera*, the Supreme Court stated

> [i]n past cases, where the question of whether this sort of declaratory judgment action[s] against the State [are] barred by the doctrine of sovereign immunity under our current Constitution has actually been raised as an issue, we have pretermitted the question. In this opinion, we squarely address that question and find that declaratory judgment actions of this type are, in fact, barred by the doctrine of sovereign immunity.

(Citations omitted.) Id. at 428, n. 4.[5] See also *SJN Properties v. Fulton County Bd. of Assessors*, 296 Ga. 793, 802 (2) (b) (iii) (770 SE2d 832) (2015) ("We have previously left unresolved the question of whether sovereign immunity generally bars claims

[5] In *Olvera*, a group of college students, who are not United States citizens, but grant beneficiaries under the Deferred Action for Childhood Arrivals program, filed a declaratory judgment action against the Board of Regents and its members in their official capacities seeking a declaration that they and other similarly situated students are entitled to in-state tuition at schools in the University System of Georgia. The Georgia Supreme Court held that the residency requirement at issue was not a rule promulgated by the agency or issued pursuant to the Administrative Procedure Act, but was merely an agency interpretation, to which the waiver of sovereign immunity under OCGA § 50-13-10 did not apply. 298 Ga. at 425.

against the State for declaratory relief. . . . [and] we decline to definitively resolve it here.").

The basis of the trial court's award of attorney fees here was that all of appellants' claims were barred by sovereign immunity, thus, the lawsuit was frivolous. The trial court made no reference to the factual allegations of the complaint nor did it conclude that appellants failed to state a claim with respect to the declaratory judgment action. See *Walker v. Owens*, 298 Ga. 516, 519 (783 SE2d 114) (2016) (no need to address whether sovereign immunity barred declaratory judgment action where plaintiff failed to state a claim with respect thereto).

As noted previously, OCGA § 9-15-14 (a) fee awards are not appropriate if the claim asserted below either had some factual merit or presented a justiciable issue of law. Similarly, OCGA § 9-15-14 (b) fees require a finding that a claim lacked substantial justification, unnecessarily prolonged the proceedings, or were interposed for delay. While the imposition of some fees may be justified in this case, the trial court appears to have awarded fees solely because of its conclusion that sovereign immunity barred all of appellants' claims. The Georgia Supreme Court's decision in *Olvera*, supra, was issued two months after the trial court's award of attorney fees and it continues to be unclear whether sovereign immunity bars claims for injunctive or

declarative relief relating to legislation that is alleged to be unconstitutional.[5] Accordingly, the trial court erred in awarding attorney fees on the single ground that sovereign immunity barred all of appellants' claims against Lambros. Since the trial court based the award on an incorrect conclusion that *all of* appellants' claims were devoid of any justiciable issue of law and lacked substantial justification, the award must be vacated.

At the hearing, Lambros submitted an invoice reflecting fees and expenses in the amount of $49,060.97, the exact amount awarded by the trial court. Because the trial court ruled that *all of* appellants' claims were devoid of any justiciable issue of law and lacked substantial justification, it had no need to apportion fees between the claims. Therefore, we cannot tell from the order what portion of the trial court's award of fees and expenses is attributable to appellants' claim for declaratory

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[5] See *State v. Intl. Keystone Knights of the Ku Klux Klan*, 299 Ga. 392, 395 (1), n.11 (788 SE2d 455) (2016). ("Since [*Ga. Dept. of Natural Resources v. Center for a Sustainable Coast*, 294 Ga. 593, 755 SE2d 184 (2014)], we have not had occasion to consider the extent to which the doctrine of sovereign immunity bars claims for injunctive or declaratory relief from state action that is alleged to be unconstitutional. Cf. *Olvera*, [supra]."). See also *DeKalb County School Dist. v. Gold*, 318 Ga. App. 633 (734 SE2d 466) (2012), overruled on other grounds by, *Rivera v. Washington*, 298 Ga. 770 (784 SE2d 775) (2016) (sovereign immunity barred teachers' claim for declaratory judgment as to school district's budgetary obligation to fund alternative social security plan; plaintiffs were not seeking declaratory relief in conjunction with injunctive relief and were not presenting a facial challenge to the constitutionality of legislative acts).

judgment. "As we have held in cases involving OCGA § 9-15-14 (a) or (b), the trial court must limit the fees award to those fees incurred because of the sanctionable conduct." (Citation and punctuation omitted.) *Brewer*, supra, 296 Ga. App. at 31 (2). Accordingly, we must vacate the trial court's order and remand for further proceedings consistent with this opinion. See *Razavi v. Merchant*, 330 Ga. App. 407, 410 (1) (c) (765 SE2d 479) (2014) (trial court may hold hearing if it needs supplemental evidence to determine amount of attorney fees).

3. Appellants contend that the trial court erred in denying their motion to compel discovery responses regarding Lambros's purported attorney fees. In this case, Lambros filed a motion for attorney fees after appellants voluntarily dismissed their lawsuit, which he was entitled to do under OCGA § 9-15-14. See *Abrahamsen v. McDonald's Corp.*, 197 Ga. App. 624, 624 (398 SE2d 861) (1990) (a claim for reasonable and necessary attorney fees and expenses of litigation must be brought within 45 days after the final disposition of the underlying action). The trial court determined that the underlying action was not a *pending action* as provided by OCGA § 9-11-26, that Lambros's motion for attorney fees under OCGA § 9-15-14 did not come within the purview of OCGA § 9-11-26, and that, therefore, appellants were not entitled to the compelled discovery.

Pretermitting whether the trial court's rationale is correct, appellants have not shown how they were harmed by the denial of their motion to compel. See e.g. *Alliance Partners v. Harris Trust & Sav. Bank*, 266 Ga. 514, 515 (2) (467 SE2d 531) (1996). The trial court conducted a thorough evidentiary hearing on the motion for attorney fees, at which time appellants had the opportunity to cross-examine Lambros about the work performed by his law firm and the reasonableness and necessity of the fees requested. Accordingly, the trial court did not err in denying the motion to compel.

4. Appellants contend that the trial court erred in placing unreasonable time restrictions on the hearing for attorney fees. Specifically, appellants argue that the trial court improperly limited the hearing to one hour and considered Lambros's motion to dismiss at the same time. This enumeration is meritless.

Appellants waived any objection to the length of the hearing by failing to object at anytime during the hearing. See, e.g., *Jones v. Orris*, 274 Ga. App. 52, 56 (1) (616 SE2d 820) (2005) (party waived objection to shortened time to respond to motion for summary judgment by arguing the motion without objection during the hearing). Quite the contrary, appellants' counsel specifically thanked the trial court for granting their request to extend the hearing from one half hour to one hour.

Moreover, the hearing transcript does not support appellants' contention that the trial court considered arguments pertaining to the motion to dismiss. While appellants made a passing reference to the motion to dismiss in the hearing, this motion was rendered moot by their voluntary dismissal, and the trial court neither ruled upon it, nor made any mention of it during the hearing.

Judgment vacated and case remanded with direction. Dillard, P. J., concurs. Ray, J., concurs fully in Divisions 1, 2 and 4 and in judgment only as to Division 3.